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## Freedom of Information: Federal and New York State Laws

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## Freedom of Information: Federal and New York State Laws

### Abstract

The initial Freedom of Information Act was created so that the public could have greater access to records possessed by federal government agencies. President Linden B. Johnson signed the Act into law on July 4, 1966 and it went into effect the next year. While this Act applies only to federal agencies, all of the states have created similar statutes which require disclosure by state and local government agencies.

### Keywords

Buffalo, Government, Open Government, Report, Other, PDF

# **FREEDOM OF INFORMATION: Federal and New York State Laws**

**Janette Clarke  
May 2, 2009**



## **What is the federal Freedom of Information Act (FOIA)?**

The initial Freedom of Information Act was created so that the public could have greater access to records possessed by federal government agencies. President Linden B. Johnson signed the Act into law on July 4, 1966 and it went into effect the next year. While this Act applies only to federal agencies, all of the states have created similar statutes which require disclosure by state and local government agencies.

## **What is the purpose of Freedom of Information Laws?**

Prior to 1966, individual citizens had the burden of establishing that they had a right to view certain documents possessed by government agencies.<sup>1</sup> However, this burden goes directly against the idea that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions".<sup>2</sup> The Freedom of Information Act places the burden on governmental agencies to prove that a request is exempt from the Act. In other words, the Act creates a presumption that records possessed by governmental agencies are available to citizens.<sup>3</sup> The old "need to know" standard has been replaced by a new "right to know" standard.<sup>4</sup>

## **Has FOIA been successful?**

In 1996, Congress stated the federal Freedom of Information Act is not only a valuable means in which a person may learn more about government operations,

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<sup>1</sup> Citizens Guide on Using the Freedom of Information Act, Section I: *available at* <http://www.fas.org/sgp/foia/citizen.html>.

<sup>2</sup> Freedom of Information Law, NY CLS Pub O § 84 (2009).

<sup>3</sup> *See* Citizens Guide, *supra* note 1.

<sup>4</sup> *Id.*

but it "has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government."<sup>5</sup> Additionally, the Act has "led to the identification of unsafe consumer products, harmful drugs, and serious health hazards."<sup>6</sup>

### **Have there been recent changes to FOIA?**

In 1996, the 104th Congress enacted the Electronic Freedom of Information Act.<sup>7</sup> It changes several sections of the Freedom of Information Act to include electronic information. Documents described in 5 U.S.C. Sec. 552(a)(2) that are created by federal agencies after November 1, 1996, must be made available to the public in electronic format.<sup>8</sup>

Most recently, in December 2005, President George W. Bush created Executive Order 13392, otherwise known as "Improving Agency Disclosure of Information".<sup>9</sup> This order "reaffirmed that FOIA 'has provided an important means through which the public can obtain information regarding the activities of Federal agencies' and required Federal agencies to make their FOIA programs 'citizen-centered and results-oriented.'"<sup>10</sup> Among several other things, the Order requires federal agencies to appoint a senior official to serve as the chief FOIA official of that agency.<sup>11</sup>

Additionally, the Order requires federal agencies to create "FOIA Requester Service Centers" to help process FOIA requests.<sup>12</sup>



### **What are some examples of information that can be requested?**

- Descriptions of agency organization and office addresses;
- Statements of the general course and method of agency operation;
- Rules of procedure and descriptions of forms;
- Substantive rules of general applicability and general policy statements.
- Final opinions made in the adjudication of cases;
- Statements of policy and interpretations adopted by an agency, but not published in the Federal Register;
- Administrative staff manuals that affect the public;
- Copies of records released in response to FOIA requests that an agency determines have been or will likely be the subject of additional requests;
- A general index of released records determined to have been or likely to be the subject of additional requests.<sup>13</sup>

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<sup>5</sup> The Electronic Freedom of Information Act, H.R.3802(a)(3)-(4) (Jan 3, 1996).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Consumer Product Safety Commission, Electronic Reading Room, *available at*: <http://www.cpsc.gov/LIBRARY/FOIA/foia.html>.

<sup>9</sup> Executive Order 13392 (December 14, 2005).

<sup>10</sup> Federal Communications Commission, *supra* note 11.

<sup>11</sup> Executive Order 13392 *supra* note 12.

<sup>12</sup> *Id.*

<sup>13</sup> Citizen's Guide, *supra* note 1 at VI(B).

## Can the requested information be in any format?

Information that can be requested under FOIA is not limited to paper or electronic documents. "Any record, regardless of its form, may be requested under FOIA. This includes documents, photographs, maps, tape recordings, computer files, etc."<sup>14</sup>

## What kinds of documents are not available under FOIA?

There are nine specific exemptions to the Freedom of Information Act:<sup>15</sup>

1. **Classified documents, including national defense and foreign policy materials:** "This exemption is designed to prevent disclosure of properly classified records, release of which would cause some "damage" to the national security."<sup>16</sup>
2. **Internal personnel rules and practices:** "This . . . information includes documents such as employee parking rules and agency cafeteria rules. [This information] does not cover documents that could be viewed as the subject of legitimate public concern, such as personnel evaluation forms."<sup>17</sup>
3. **Information exempt under other laws:** The laws in question must "(A) require[] that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or, (B) establish[] particular criteria for withholding or refers to particular types of matters to be withheld."<sup>18</sup>
4. **Confidential business information:** "Exemption 4 intends to protect "trade secrets," such as customer lists and secret formulas. It also shields sensitive internal commercial information about a company which, if disclosed, would cause the company substantial competitive harm."<sup>19</sup>
5. **Internal government communications:** "This exemption is intended to incorporate material normally privileged in civil litigation."<sup>20</sup>
6. **Personal privacy:** This exemption applies "only when the individuals' interests in privacy outweigh the public's interest in disclosure". It applies to documents such as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>21</sup>
7. **Law enforcement records:** "This exemption is primarily designed to protect documents when untimely disclosure would jeopardize criminal or civil investigations or cause harm to persons who help law enforcement officials or are otherwise involved in law enforcement matters."<sup>22</sup>



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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at F.

<sup>16</sup> Federal Open Government Guide, *available at*: <http://www.rcfp.org/fogg/index.php?i=ex1>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

8. **Financial institutions:** "This applies mainly to reports prepared by federal agencies about the conditions of banks and other federally regulated financial institutions."<sup>23</sup>
9. **Geological information:** "This exemption is primarily designed to prohibit speculators from obtaining information about the location of oil and gas wells of private companies."<sup>24</sup>

The United States Supreme Court has ruled on these exemptions for several companies and government agencies.

- In Department of the Air Force v. Rose, 425 U.S. 352 (1976), the Court held that "[e]xemption 2 applies only to information in which there is little or no public interest and thus could not protect information about Ethics Code violations at the Air Force Academy."<sup>25</sup>
- Similarly, in Federal Bureau of Investigation v. Abramson, 456 U.S. 615 (1982), the Court found that "[r]ecords compiled for law enforcement purposes do not lose their exempt status when they are incorporated into records compiled for purposes other than law enforcement."<sup>26</sup>
- The Court also ruled on exemption number 5 in United States v. Weber Aircraft Corp., 465 U.S. 792 (1984). In this case, the Court found that "[e]xemption 5 incorporates a privilege protecting witness statements given to military personnel in the course of military air crash safety investigations."<sup>27</sup>



### Can the fees be waived?

In 1986 the FOIA Reform Act created specific fee provisions for four different categories of requesters. Some of the following categories include full or limited fee exemptions:

1. "Commercial use requesters must pay fees for document search, duplication and review;
2. Non-commercial requesters from educational or scientific institutions pay no search fees and receive 100 pages of free duplication;
3. Representatives of the news media pay no search fees and receive copies of 100 pages free;
4. All other requesters receive two hours of search time and copies of 100 pages free."<sup>28</sup>

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Federal Open Government Guide, Major U.S. Supreme Court FOIA cases, *available at*: <http://www.rcfp.org/fogg/index.php?i=cases>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Requesters may also ask the agency to reduce fees if even if the fees are accurate but the cost causes a request to become "prohibitively expensive."<sup>29</sup>

### **What happens if my FOIA request is denied?**

Agencies have 20 days to determine whether a request will be granted or denied. When a request is denied, the agency must inform the requestor of the reasons for the denial and that she has the right to appeal the denial.<sup>30</sup> "An appeal is filed by sending a letter to the head of the agency. The letter must identify the FOIA request that is being appealed. The envelope containing the letter of appeal should be marked in the lower left-hand corner with the words 'Freedom of Information Act Appeal'.<sup>31</sup> In many cases, appeals are granted because the person reviewing the appeal has more familiarity with Freedom of Information Laws than the person who reviewed the initial request.<sup>32</sup>

If an appeal to a federal agency is denied, the requestor may file a FOIA lawsuit in a United States District Court.<sup>33</sup> While it is not free to file a FOIA complaint, it should be "relatively inexpensive and simple."<sup>34</sup> Additionally, it is not necessary to use an attorney when filing a complaint against the government. An attorney is recommended, however, if the issues in the complaint are very complex.<sup>35</sup>



### **Does New York State have a Freedom of Information Law?**

New York State established a Freedom of Information Law (FOIL) that became effective on January 1, 1978.<sup>36</sup> It is codified in Article 6 of the Public Officers Law. Its provisions are very similar to FOIA. A recent New York State court case reaffirmed the "right to know" standard by holding that "[a]ll records of public agency are presumptively open to public inspection, and Freedom of Information Law is to be liberally construed with its exceptions narrowly interpreted."<sup>37</sup>

### **Does Erie County have a Freedom of Information Law?**

Erie County does not have its own separate Freedom of Information Law because it is subject to the New York State Law. The law is mentioned in section 202.4 of the Erie County Charter, which states that "[t]he Legislature shall name an open meetings advisor from among its members to advise the body on compliance with

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<sup>29</sup> *Id.*

<sup>30</sup> Citizen's Guide, *supra* note 1 at section VI(E).

<sup>31</sup> *Id.*

<sup>32</sup> Federal Open Government Guide, *Appealing and Initial Denial*, available at: <http://www.rcfp.org/fogg/index.php?i=pt3#d>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Freedom of Information Law, NY CLS Pub O § 84 (2009).

<sup>37</sup> Tartan Oil Corp. v State Dep't of Taxation & Fin. (1998, 3d Dept) 239 App Div 2d 36, 668 NYS2d 76.



New York State Open Meetings and Freedom of Information laws."<sup>38</sup> This provision was added to the Erie County Charter in 2006.

### **How do I make a request and where do I send it?**

There are many "boilerplate" forms available for FOIA and FOIL requests. Some of the individual departments in the City of Buffalo have them directly on their websites. As an example, the form for the Department of Economic Development, Permit and Inspections Services is located at the end of this fact sheet.

Although many examples of requests are readily available, no specific form is needed. FOIA and FOIL requests can be short and simple.<sup>39</sup> Requests should, however, include the following three items:

1. The letter should clearly state that the request is being made under the Freedom of Information Act.
2. The letter should name the records being requested as clearly and specifically as possible.
3. The requestor must include his or her name and address. (It is also helpful, but not necessary to include a telephone number in case the person searching for the record has any questions or needs further clarity)<sup>40</sup>

The requestor may also want to specify the maximum amount that he or she is willing to pay for the records. Requestors are commonly contacted if the fees will surpass a fixed amount. This gives the requestor the option of withdrawing or modifying the request.<sup>41</sup>

The New York Freedom of Information Law does not preclude agencies from developing their own standard FOIL forms. However, the agencies must still respond to written FOIL requests in a timely manner "if requested records are reasonably described."<sup>42</sup>

Most departments in Erie County have a designated FOIL Records Access Officer who receives requests. It is best to contact the individual department to find out where the request should be sent. This information can also be obtained by calling the Erie County Information line at (716) 858-600.<sup>43</sup>



### **Are FOIL requests free?**

The fee for a copy of a record is 25 cents per photocopied

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<sup>38</sup> Erie County Charter, *available at*: <http://www.erie.gov/laws/eccode/charter2.asp>.

<sup>39</sup> Citizen's Guide, *supra* note 1 at VI(C).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> New York State Committee on Open Government, OML-AO-3397.

<sup>43</sup> Erie County Government, Hotlines and Phone Numbers, *available at*: <http://www.erie.gov/contact.asp>.



page.<sup>44</sup> If the reproduction of a particular record requires more than a simple photocopy, the agency may only charge the "actual cost" of the reproduction.<sup>45</sup> In determining the actual cost, an agency may take several factors into account, including:

1. "An amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;
2. The actual cost of the storage devices or media provided to the person making the request in complying with such request;
3. The actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and
4. Preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record."<sup>46</sup>

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<sup>44</sup> NY CLS Pub O § 87.

<sup>45</sup> *Id.*

<sup>46</sup> NY CLS Pub O § 87

**CITY OF BUFFALO  
RECORD REQUEST FORM  
DEPARTMENT OF ECONOMIC DEVELOPMENT,  
PERMIT & INSPECTION SERVICES**

**Under the provisions of the New York FREEDOM OF INFORMATION LAW (F.O.I.L.), Article 6 of the Public Officers Law, I hereby request the records or portions thereof that I have reasonably described in Part "B" of this form.**

**PART A - APPLICANT INFORMATION**

1. Name of Applicant: \_\_\_\_\_
2. Company Name: \_\_\_\_\_
3. Address: \_\_\_\_\_ State: \_\_\_\_\_ Zip Code: \_\_\_\_\_
4. Type of Business: \_\_\_\_\_
5. Telephone Number: \_\_\_\_\_ Fax Number: \_\_\_\_\_
6. E-Mail: \_\_\_\_\_ ☐ I do not want to receive any information via e-mail.

**PART B – INFORMATION REQUESTED**

Describe the records that you are requesting in the space provided below. Please include as much detail as possible such as dates, titles, or any other information that may assist us in locating the record(s) you are seeking. Please be mindful that the record or document that you are requesting may not exist.

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**PART C – METHODS OF REVIEW**

☐ I would like an appointment to review the records that I am requesting in the Office of the City of Buffalo Department of \_\_\_\_\_ Economic Development, Permit & Inspection Services. If I desire copies, I understand that I will be charged a fee in accordance with the schedule listed below in the section entitled "Fees." I also understand that copies may not be immediately available.

☐ I would like the requested documents mailed to me. I understand that I will be billed for copying charges and will not receive the documents until I have remitted payment to the address listed in the section entitled "Submission of Request." I understand that I will be charged a fee in accordance with the schedule listed below in the section entitled "Fees."

☐ I would like the requested information provided via an electronic format.

**PART D – FEES**

If you should desire copies of records, the following fees will apply in accordance with 16 NYCRR §6-1.2. Advanced payment is required before records will be released. Please make check or money orders payable to the **City of Buffalo**.

**CHARGES FOR COPYING:**

*Pages up to 9" x 14" \$.25 ea. Pages over 9" x 14" \$.70 ea.*

The fee for special reproductions such as photocopies for large items shall be based upon the average unit cost of copying a record, excluding fixed costs of the department, such as operator salaries.

**PART E – SUBMISSION OF REQUEST**

After you have reasonably described the records you wish to inspect or obtain, please sign this form and return it to the address listed below. Requests may be mailed or hand delivered. Please note that you do not have to complete this form in order to request records from this Department, however, it will facilitate access to the records.

**CITY OF BUFFALO DEPARTMENT OF ECONOMIC DEVELOPMENT, PERMIT & INSPECTION SERVICES**

**ATTN: RECORDS ACCESS OFFICER**

**65 NIAGARA SQUARE, CITY HALL ROOM 301**

**BUFFALO, NEW YORK 14202**

**PART F – COMMERCIAL PURPOSES CERTIFICATION & AFFIRMATION**

**THIS SECTION MUST ONLY BE COMPLETED IF YOU ARE REQUESTING A LIST OF NAMES AND ADDRESSES.** By signing below, I certify that such list(s) will not be used for commercial or fundraising purpose. Section 87(2)(b) and 89(2)(b)(iii) of the New York State Public Officers Law permit the City of Buffalo to seek a certification from an applicant seeking disclosure of a list of names and addresses, that such list will not be used for commercial or fundraising purposes.

**Signature:**\_\_\_\_\_ **Print Name:**\_\_\_\_\_ **Date:**\_\_\_\_\_

I hereby affirm that the information I have provided on this request form is correct.

**Signature:**\_\_\_\_\_ **Print Name:**\_\_\_\_\_ **Date:** \_\_\_\_\_

**PART G – DISPOSITION OF REQUEST-----DO NOT WRITE BELOW THIS LINE-----**

☐ **REQUEST RECEIVED** – The Department of Economic Development, Permit & Inspection Services is reviewing your request. The Department will notify you as to whether your request will be granted or denied on or about the following date: \_\_\_\_\_.

☐ **APPROVED** – The approximate date the records will be available: \_\_\_\_\_. To arrange for access to the records, contact:

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☐ **DENIED** – For the reason(s) checked: References are to Section 87 of the NYS Public Officers Law

- ☐ Records are specifically exempted from disclosure by state or federal statute 2 (a)
- ☐ Disclosure would constitute an unwarranted invasion of personal privacy 2(b)
- ☐ Disclosure would impair present or imminent contract awards or collective bargaining negotiations 2 (c)
- ☐ Records are exempt from disclosure under the Law Enforcement Exemption 2 (e)
- ☐ Disclosure could endanger the life or safety of any person 2 (f)
- ☐ Records are exempt from disclosure under the Inter/Intra – Agency Materials Exemption 2(g)
- ☐ Other:

☐ **MATERIAL REDACTED**

☐ **UNAVAILABLE** – For the reason(s) indicated:

- ☐ Records Requested were not described in sufficient detail

- ☐ The records you have requested are not maintained by this department
- ☐ This Department maintains the records you have requested, but the records could not be located after a diligent search.
- ☐ Other:

SIGNED: \_\_\_\_\_ TITLE: \_\_\_\_\_ DATE: \_\_\_\_\_

## PART H – APPEALS

If you are denied access to records or portions of records, you may submit a written appeal the Commissioner of Economic Development, Permit & Inspection Services, City Hall, Room 324. Such appeal must be made within **thirty (30) days** after you receive the denial. Please attach a copy of this completed form when filing your appeal. The Appeals Officer will evaluate the appeal and respond to you in writing within **ten (10) business days** after receipt of the appeal.